SINGAPORE REPORT

RE WILL OF P.M. FRAMROZ DECD.; S.F. FRAMROZ & ANOR. v. THE CHARTERED BANK (M) TRUSTEE LTD. & ANOR.

[C.A. (Tan Ah Tah, Winslow & Choor Singh JJ.)
October 23, 1971]

[Singapore — Federal Court Civil Appeal No. Y32 of 1969]

Will — Construction — Intention of testator.

This was an appeal against the decision of the learned Chief Justice ([1970] 1 M.L.J. 171). The facts appear sufficiently in the judgment. The matter came before the High Court, as a court of construction, and which required the interpretation of certain provisions of a will.

The learned Chief Justice held that on the true construction of the will, and having regard to the general scheme of the will and all the relevant circumstances, the two daughters, nieces of the testator, did not take the share in the income on the death of their mother, and the share should be paid to the Singapore Association for the Blind.

The question for determination was not what the testator meant to do when he made his will, but what the written words he used meant in the particular case, *i.e.* what were the "expressed intentions" of the testator.

Held, dismissing the appeal: (1) in order to adjudicate upon the matter, after considering the language of the will and all relevant circumstances, the construing court must adopt what appears the most probable meaning of what the testator has said by means of the written words he has used. In short, what are the expressed intentions of the testator?;

(2) in this case there was nothing in the language of the will, the scheme of the whole will and the surrounding circumstances, taken as a whole, which impelled the court to say that the testator had not expressed his intentions in plain and unambiguous language.

Cases referred to:-

(1) *Perrin* v. *Morgan,* [1943] A.C. 399.

(2) *Archer* v. *Jegon,* 59 E.R. 177.

COURT OF APPEAL.

Y. R. Jumabhoy for the appellants.

Harry Elias for the first respondent.

P. Selvadurai for the second respondent.

Cur. Adv. Vult.

Winslow J. (delivering the judgment of the court): This is an appeal against the judgment of the learned Chief Justice in the High Court sitting as a court of construction required to determine the true construction to be placed on the provisions of clause 3(1)(b) proviso (iii) of the will of the testator herein dated 11th June, 1956 which the court decided in favour of the second respondent, the Singapore Association for the Blind, as against the two appellants, who are nieces of the testator, by virtue of the provisions of clause 3(1)(c).

By his will, the testator devised and bequeathed all his shares in Framroz Ltd. to his trustees upon certain trusts, the first of which was a direction to the trustees to pay from the income on these shares as to three equal one-fourth parts thereof the sum of Rupees 300 or its equivalent in Malayan currency each quarter to each of five named beneficiaries during their lifetime and to divide the balance of the three equal one-fourth parts of the income equally between five other named beneficiaries, two of whom were Shirinbai Framroz Framroz of 7 Fredrick Terraces, 4 Mahatma Gandhi Road, Poona — 1 and Rustam Pestonji Gandhi of Rashid Mansion, Colaba Road, Bombay — 1.

The testator however provided by provisoes (ii) and (iii) to clause 3(1)(b) as follows: —

"(ii) on the death of the said Shirinbai Framroz Framroz the share of the income which would be payable to her if she had been living shall be paid to her two daughters namely:

(1) SHEROO FRAMROZ FRAMROZ of 7 Fredrick Terraces, 4 Mahatma Gandhi Road, Poona-1 and

(2) DIANA FRAMROZ FRAMROZ of 7 Fredrick Terraces, 4 Mahatma Gandhi Road, Poona-1

or the survivor or survivors of them in equal shares or proportions and

(iii) on the death of the said Rustam Pestonji Gandhi the share of the income which would be payable to him if he had been living shall be paid to the said Shirinbai Framroz Framroz or if she shall then be dead to her two daughters namely:

(1) SHEROO FRAMROZ FRAMROZ of 7 Fredrick Terraces, 4 Mahatma Gandhi Road, Poona-1 and

(2) DIANA FRAMROZ FRAMROZ of 7 Fredrick Terraces, 4 Mahatma Gandhi Road, Poona-1

in equal shares and proportions or to the survivor or survivors of them..."

The testator by provisoes (i), (iv) and (v) provided that the share of the income of the three other named beneficiaries who were his sister, a nephew and another nephew, respectively, which would be payable to them if they had been living should be paid to certain named children of the sister on her death and, on the death of each of the other two nephews, their respective shares of the income should be paid to certain other close relatives of theirs whom he named in each case.

To revert to provisoes (ii) and (iii), it may help to set out in some detail the exact relationship between the persons mentioned in those provisoes and the testator. Shirinbai Framroz Framroz, the mother of the two appellants named in proviso (ii) was, at the date of the will in 1956, the sister-in-law of the testator. Her husband, who was the testator's brother had died, an invalid, in 1946 and it is not disputed that that brother in his lifetime as well as the sister-in-law and the two daughters, who are the present appellants, were maintained by the testator during his lifetime. They claimed to be the least well-off of all the persons named as the five beneficiaries taking the balance of the three equal one-fourth parts of the income.

Rustam Pestonji Gandhi was a nephew of the testator. He was 75 years of age at the time of the will. He died a bachelor leaving no children. The two last named beneficiaries whom we have mentioned earlier as nephews of the testator were Rustam's brothers. All of them are said to be well-off except for the persons we have already mentioned who were supported by the testator when he was alive.

It is also pertinent to note that, whereas Rustam was 75 years old in 1956, Shirinbai was only 61. The two appellants, her daughters, claimed that the testator regarded them as his own children. It is also per-

tinent to note that the testator himself is said to have died a bachelor leaving no children of his own.

We mention some of these background facts because of the claim that the will must be construed having regard to the relevant circumstances when the testator made his will including, as Lord Atkin at page 414 of *Perrin* v. *Morgan*[1] said:

"the age and education of the testator, his relations to the beneficiary chosen, whether of kinship or friendship, the provision for other beneficiaries and other admissible circumstances".

As Lord Atkin also said,

"the construing court has to ascertain what was meant, being guided by the other provisions of the will and the other relevant circumstances".

Lord Romer also said in the same case,

"a will should be so construed as to give effect to the intention of the testator such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed, the court is entitled, to use a familiar expression, to sit in the testator's arm-chair."

The question for this court is therefore, as Viscount Simon L.C. said at page 406 of the same case,

"not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case — what are the 'expressed intentions' of the testator".

In order therefore to adjudicate upon the matter, after considering the language of the will and all the relevant circumstances, the construing court must adopt what appears the most probable meaning of what the testator has said by means of the written words he has used. In short, what are the expressed intentions of the testator?

It must be remembered that Lord Romer in the same case at page 420 said that, when seated in the testator's arm-chair,

"the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said"

because the general rule as stated by *Jarman*, on Wills, Vol. 3, 8th Edition at page 2070 at Rule XVI is that

"words are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another can be collected and that other can be ascertained."

There can be no doubt what provisoes (i), (ii), (iv) and (v) clearly mean. On the death of each of the various named beneficiaries, the other persons named in each proviso take the share which the named beneficiary would take if he or she had been living.

Proviso (iii) which is the crucial proviso referred to the court by the trustees for its true construction is different from all the other provisoes. Although it makes a direct gift over of the share of the income on the death of the named beneficiary to another person or persons it does not simply stop there. It goes further than that.

After providing that on the death of the said Rustam the share of the income which would be payable to him if he had been living shall be paid to the said, Shirinbai, this proviso goes on to say "or if she shall then be dead, to her 2 daughters" namely, the appellants. It will be noted that by proviso (ii), about which we have already said there can be no doubt, on the death of the said Shirinbai, the share of the income which would be payable to her if she had been living shall be paid to the two appellants.

Counsel for the appellants accordingly seized on the repeated mention of the two appellants in proviso (iii) after their having already been mentioned as taking a gift over on the death of their mother under proviso (ii) as showing clearly what the intentions of the testator were, namely, that he intended to benefit the two appellants twice, once on the death of the mother when they would take the share payable to her if she had been living and yet again under proviso (iii).

Counsel for the appellants submitted that on the death of Rustam the appellants took a vested gift under proviso (iii) because their mother had survived Rustam and that, therefore, she took a substitutional share which passed to them on her death as in the case of proviso (ii). He cited the case of *Archer* v. *Jegon*[2] in support of his contention that the meaning to be attached to the word "then" occurring in the expression "if she shall then be dead" is "on the date of Rustam's death". With this contention no one can disagree.

What, however, does proviso (iii), in fact, state? It seems to us clear beyond any doubt whatsoever that the plain meaning of the words used can lead only to one conclusion, namely, that the share of the income which would be payable to Rustam if he had been living shall be paid to the said Shirinbai or, if she shall be dead at the time of Rustam's death, that share shall be paid to her two daughters.

Shirinbai, however, was not dead at the time of Rustam's death. She was very much alive. In our view she clearly took the share of his income on Rustam's death in 1959. That gift took effect on the testator's death because Rustam predeceased the testator (by one year).

On Rustam's death therefore Shirinbai took the share which would be payable to him if he had been living. It seems to us quite clear from the words used in proviso (iii) that whatever was payable to Shirinbai under this proviso ceased with her death in 1966. The gift to her was no longer payable after her death. We cannot accept the contention that on her death the share became payable to her two daughters, the appellants, because the will clearly provides as an alternative to payment to Shirinbai that this share shall be paid to the appellants on Rustam's death if Shirinbai shall then be dead, *i.e.* shall be dead at the time of Rustam's death which she certainly was not.

The court cannot be expected to make a fresh will for the testator by substituting the words "and on her death" for the clear words "or if she shall then be dead".

We can find nothing capricious in the way the testator dealt with the matter. Shirinbai was 14

years younger than Rustam and there is nothing to indicate that she could not have lived according to the testator's expectations for another 14 years at least after Rustam's death during which time she would have been receiving Rustam's share. It is not as if she were older than Rustam. The testator had already made one provision for the two appellants under proviso (ii). If it had been his intention to benefit them twice altogether he could quite easily have said "and on her death" in proviso (iii) but he did not. There is accordingly nothing in the language of the will, the scheme of the whole will and the surrounding circumstances, taken as a whole, which impels us to say that the testator has not expressed his intentions in plain and unambiguous language when he said "or if she shall then be dead".

We would accordingly agree with the judgment of the learned Chief Justice and dismiss this appeal.

Appeal dismissed.

Solicitors: *Mallal & Namazie; Drew & Napier; Rodyk & Davidson.*

MALAYSIAN REPORTS

RAJAGOPAL v. RAJAN

[F.C. (Ong C.J. (Malaya), Gill F.J. and Ong Hock Sim J.)

April 1 1971]

[Ipoh — Federal Court Civil Appeal No. X 16 of 1966]

Defamation — Libel — Letter written in pursuance of resolution tabled at annual general meeting — Contents of — Per se defamatory — Whether defence of qualified privilege available — Finding of malice — Effect of.

Damages — Libel — Circumstances taken into account in computation of quantum.

This was an appeal from a judgment of the High Court. The learned trial judge had found that a letter with enclosures sent by the appellant was *per se* of a defamatory character. He rejected the defence of qualified privilege on the ground that the appellant had exceeded his duty as secretary of the branch of the Malayan Indian Congress by sending copies of the resolution to persons he was not required to send and he had been responsible for the forwarding the letter which made allegations containing defamatory imputations. He found evidence of express malice and rejected the evidence of fair comment.

Held, dismissing the appeal: (1) there was no reason for disagreeing with the learned trial judge's finding that the forwarding letter was *per se* defamatory;

(2) there was evidence to warrant the conclusion that the appellant had been actuated by malice and that the defence of qualified privilege was not available to the appellant;

(3) as there was malice, the defence of fair comment could not succeed.

Cases referred to:-

(1) *Brown* v. *Croome* (1817) Starkie (NP) 297; 171 E.R. 652.

(2) *Thomas* v. *Bradbury, Agnew & Co. Ltd.* [1906] 2 K.B. 627 at p. 642.

(3) *Sutherland* v. *Stopes* [1925] A.C. 47 at p. 63.

FEDERAL COURT.

Dato' Athi Nahappan with *D.P. Vijandran* for the appellant.

Dato' S. P. Seenivasagam with *Paramjit Singh Gill* for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): I have had the advantage of reading the judgment of my brother Ong with which I am in full agreement and have nothing to add.

I would dismiss the appeal with costs.

Ong Hock Sim J.: The appellant was, with one K. Thangavelu, the defendant in an action brought by the respondent claiming damages for libel contained in a letter dated the 11th June, 1963 and the resolution passed at the annual general meeting of the Kuala Kangsar branch of the Malayan Indian Congress held on the 2nd June, 1963. The action against the said Thangavelu abated by reason of his death as a result of a motor accident and in the event, judgment was given against the appellant alone in the sum of $1,500/- as damages and costs.

The parties to the action were all members of the said Kuala Kangsar branch at all material times. The deceased Thangavelu was president and the appellant, the secretary. The respondent complained that the appellant had published certain documents, namely